

October 24, 2014

By Email Only

(b)(6)

Michael L. Rhodes
Director, Office of the Deputy Chief Management Officer
Department of Defense
9010 Defense Pentagon
Washington, D.C. 20301-9010
C/O: Darrell Walker (secrev1@whs.mil and Darrell.W.Walker.civ@mail.mil)
Mark Langerman (Mark.M.Langerman.civ@mail.mil)

Re: DOPSR Case No. 14-S-0806

Dear Mr. Rhodes,

I write in response to your letter dated October 22, 2014, regarding the above-referenced appeal dated March 17, 2014 and supplemented on April 6, 2014 (the "Appeal").¹ Please confirm that I have now exhausted all administrative remedies with respect to the Appeal. If there are any additional administrative remedies available, please advise me of the procedures to invoke those remedies.

I note that your half-page response to the Appeal took over seven months, even though it pertained to just one sentence referred to in one document. I further note that your response did not address any of the existing law set forth in the Appeal, and relied solely on a June 7, 2013 Defense Department memorandum from Timothy A. Davis, Director of Security, with the subject line "Notice to DoD Employees and Contractors on Protecting Classified Information and the Integrity of Unclassified Government Information Technology Systems," for support (the "Memo"). It is well settled that an executive memorandum cannot trump the law as set forth by our Federal Courts. Indeed, not even the President can achieve such an outcome. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (invalidating executive order because it conflicted with decision in *NLRB v. Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938)).

Moreover, even if the Memo did trump established law as set forth by our Federal Courts (it does not), it is irrelevant and your citation to it is bizarre. First, it pertains to current Defense Department employees and contractors. I am neither. I resigned from the Defense Department in 2011, and only thereafter submitted this article for pre-publication review. Second, the Memo was promulgated in 2013, two years after I resigned. You have no authority to retroactively and unilaterally re-write my non-disclosure agreement by incorporating the Memo. Accordingly, the Memo does not even apply to me and your attempt to impose its strictures upon me is improper.

¹ I received your letter on October 23, 2014.

Plus, even if the Memo trumped established law (it can't) and did apply to me (it doesn't), it does not even pertain to any of the arguments mustered in the Appeal. The Memo merely states that just because a classified document is made public does not mean it is unclassified. My appeal does not contest that; it does not even address that. What the Appeal clearly contests is the Defense Department's use of my non-disclosure agreement to preclude me from citing, referencing or discussing in any way information that I did not learn as a consequence of possessing a security clearance.

As demonstrated in the Appeal, the Courts have already ruled that I have as much right to speak on matters in the public domain as any other person, so long as I do not disclose what I learned as a consequence of possessing a security clearance. Appeal at 1-2. The Appeal even cites an article posted on CIA's website regarding pre-publication review that concedes this settled point. Appeal at Ex. C. In the over seven months that you have had the Appeal you have not contested the fact that I only learned of this information by virtue of having access to the New York Times website.

I must concede that it is most frustrating to wait seven months for a decision on the Appeal to only receive a response that appears intentionally vague, arbitrary and capricious, especially as it is inconsistent with and completely ignores existing law, the CIA article posted on CIA's website regarding pre-publication review, and attempts to unilaterally re-write my non-disclosure agreement by relying on a memorandum that cannot trump existing law and does not even apply to me. Accordingly, I object to the Defense Department's efforts to unilaterally expand the scope of my non-disclosure agreement and will avail myself of all legal and equitable remedies to ensure that the Defense Department complies with the law and does not infringe upon those free speech rights I did not sacrifice in accepting employment with the Defense Department.

I waive no rights and preserve all.

Regards,

(b)(6)

Michael Richter

Cc:

(b)(3):10 USC 424